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UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN WRAPPING MATERIAL
AND METHODS FOR USE IN
AGRICULTURAL APPLICATIONS**

Inv. No. 337-TA-1210

**INITIAL DETERMINATION ON VIOLATION OF SECTION 337 AND
RECOMMENDED DETERMINATION ON REMEDY AND BOND**

Chief Administrative Law Judge Charles E. Bullock

(December 10, 2021)

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LIST OF ABBREVIATIONS

The following abbreviations may be used in this Initial Determination:

CDX	Complainants' demonstrative exhibit
CPX	Complainants' physical exhibit
CX	Complainants' exhibit
CIB	Complainants' initial post-hearing brief
CRB	Complainants' reply post-hearing brief
CPHB	Complainants' pre-hearing brief
Dep.	Deposition
JX	Joint Exhibit
RDX	Respondents' demonstrative exhibit
RPX	Respondents' physical exhibit
RX	Respondents' exhibit
RIB	Respondents' initial post-hearing brief
RRB	Respondents' reply post-hearing brief
RPHB	Respondents' pre-hearing brief
Tr.	Transcript
RNCL	Respondents' Non-Disputed Claim Terms

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Chief Administrative Law Judge Charles E. Bullock

(December 10, 2021)

Pursuant to the Notice of Investigation, this is the final Initial Determination in the Matter of Certain Wrapping Material and Methods for Use in Agricultural Applications, Investigation No. 337-TA-1210.

For the reasons stated herein, the undersigned has determined that no violation of section 337 of the Tariff Act of 1930, as amended, has occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain wrapping material and methods for use in agricultural applications alleged to infringe U.S. Patent No. 6,787,209.

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I. INTRODUCTION

A. Procedural History

Complainants Tama Group and Tama USA, Inc. (collectively, “Tama”) filed a complaint on July 7, 2020. 85 Fed. Reg. 48,561-562 (Aug. 11, 2020). Supplements to the complaint were filed on July 10 and 13, 2020. *Id.* The complaint alleged violations of section 337 based on the importation into the United States, the sale for importation, and the sale within the United States after importation of certain wrapping material and methods for use in agricultural applications by reason of infringement of U.S. Patent No. 6,787,209 (“the ’209 patent”). *Id.* The Commission voted to institute the Investigation on August 5, 2020 and the Notice of Investigation (“NOI”) was published on August 11, 2020. *Id.* Zhejiang Yajia Cotton Picker Parts Co., Ltd. (“Yajia Cotton”); Southern Marketing Affiliates, Inc. (“SMA”); Hai’an Xin Fu Yuan of Agricultural, Science and Technology Co., Ltd. (“XFY”); and Gosun Business Development Co. Ltd. (“Gosun”) were named as Respondents. *Id.* The Office of Unfair Import Investigations is not a party to the Investigation.

On August 24, 2020, Tama and Gosun moved to terminate the Investigation with respect to Gosun based on a settlement agreement and the entry of a consent order. On September 18, 2020, the undersigned granted the motion. *See* Order No. 6, *not reviewed* by Comm’n Notice (Oct. 5, 2020).

On September 16, 2020, Tama moved for leave to amend the Complaint and NOI to add Zhejiang Yajia Packaging Materials Co., Ltd. (“Yajia Packaging”) as a respondent.¹ The motion was granted on October 7, 2020. *See* Order No. 8, *not reviewed* by Comm’n Notice (Oct. 27, 2020); *see also* 85 Fed. Reg. 68,916 (Oct. 30, 2020).

¹ Yajia Cotton and Yajia Packaging are collectively referred to herein as “Yajia.”

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On November 16, 2020, XFY was found in default pursuant to Commission Rule 210.16. *See* Order No. 11, *not reviewed* by Comm’n Notice (Nov. 30, 2020).

The virtual hearing was held August 9-10, 2021.

B. The Private Parties

1. Complainants

a) Tama Group

Complainant Tama Group, formerly known as Tama Plastic Industry, is a partnership incorporated and registered under Israeli law with its principal place of business at Kibbutz Mishmar HaEmek in Israel. CX-0010 at ¶ 7. Tama Group develops, produces, and sells crop baling solutions and products for farmers. *Id.* at ¶ 9.

b) Tama USA, Inc.

Complainant Tama USA, Inc., is a Delaware corporation with its principal place of business at 9165 E. Tamarack Drive #2, 11 Dubuque, Iowa. *Id.* at ¶ 26. Tama USA, Inc. is a wholly-owned subsidiary of Tama Group. *Id.*

2. Active Respondents

a) Zhejiang Yajia Cotton Picker Parts Co., Ltd.

Yajia Cotton is a corporation organized under the laws of the People’s Republic of China with a principal place of business at 18 Sanfeng Road Diankou Town, Zhuji City, Zhenjiang Province, China. *Id.* at ¶ 30. Yajia Cotton designed the Accused Products at issue in this Investigation. RIB at 6.

b) Zhejiang Yajia Packaging Materials Co., Ltd.

Yajia Packaging is a corporation organized under the laws of the People’s Republic of China, having a principal place of business at 613, Xiafan Natural Village, Bailifan Village,

Diankou Town, Zhuji City, Shaoxing City, Zhejiang Province. CX-0010 at ¶ 36. Yajia Packaging manufactures the Accused Products designed by Yajia Cotton. RIB at 6.

c) Southern Marketing Affiliates, Inc.

SMA is incorporated under the laws of Arkansas. CX-0010 at ¶ 39. SMA maintains its principal place of business at 2623 Commerce Drive, Jonesboro, Arkansas. *Id.* SMA sells the Accused Products supplied by Yajia Packaging. RIB at 6-7.

C. Overview of the Technology

The technology in this Investigation relates to agricultural wraps, and in particular, to cotton wraps. CIB at 3; *see also* CX-0010 at ¶ 45 (“The ’209 Patent generally discloses and claims wrapping material and methods of mechanized wrapping of cotton in a unique round module form.”).

D. Products at Issue

1. The Accused Products

The accused products generally relate to “wrapping material and/or methods of wrapping that are used for wrapping bales of cotton and are used exclusively in connection with Deere Machines.” 85 Fed. Reg. 48,561-562 (Aug. 11, 2020). The Yajia products at issue include Model Nos. YJ168168 (old) (“168 wrap (old)”), YJ168168 (new) (“168 wrap (new)”), and YJ168170 (“170 wrap”) (collectively, the “Accused Products”). CIB at 4-5; RIB at 7. A summary of Tama’s infringement allegations is below:²

Model No.	Asserted Claims of the ’209 Patent
YJ168168 (old)	1, 2, 4-7, 10-14, 32, 33, 35-38 and 41-44
YJ168168 (new)	1, 2, 4-14, 32, 33, 35-38 and 41-44
YJ168170	1, 2, 4-14, 32, 33, 35-38 and 41-44

CIB at 4-5.

² Tama no longer asserts claims 15, 16, 18, 28 and 45 of the ’209 patent. CIB at 4 n.1.

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2. The Domestic Industry Product

Tama's domestic industry product is TamaWrap. CIB at 23.

II. IMPORTATION & JURISDICTION

Respondents do not contest that the Commission has jurisdiction over this Investigation. RIB at 11-12. Respondents also “do not contest that importation of Yajia products has occurred.” *Id.* at 12.

III. RELEVANT LAW

A. Infringement

In a section 337 investigation, the complainant bears the burden of proving infringement of the asserted patent claims by a preponderance of the evidence. *Spansion, Inc. v. Int’l Trade Comm’n*, 629 F.3d 1331, 1349 (Fed. Cir. 2010). This standard “requires proving that infringement was more likely than not to have occurred.” *Warner-Lambert Co. v. Teva Pharm. USA, Inc.*, 418 F.3d 1326, 1341 n.15 (Fed. Cir. 2005).

1. Direct Infringement

Literal infringement is a question of fact. *Finisar Corp. v. DirecTV Grp., Inc.*, 523 F.3d 1323, 1332 (Fed. Cir. 2008). Literal infringement requires the patentee to prove that the accused device contains each limitation of the asserted claim(s). If any claim limitation is absent, there is no literal infringement of that claim as a matter of law. *Bayer AG v. Elan Pharm. Research Corp.*, 212 F.3d 1241, 1247 (Fed. Cir. 2000).

2. Indirect Infringement

Indirect infringement may be either induced or contributory. Direct infringement must first be established in order for a claim of indirect infringement to prevail. *BMC Res. v. Paymentech*, 498 F.3d 1373, 1379 (Fed. Cir. 2007).

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a) Induced Infringement

Section 271(b) of the Patent Act provides: “Whoever actively induces infringement of a patent shall be liable as an infringer.” 35 U.S.C. §271(b) (2008). To establish liability, the patent holder must prove that “once the defendants knew of the patent, they ‘actively and knowingly aid[ed] and abett[ed] another’s direct infringement.’” *DSU Med. Corp. v. JMS Co., Ltd.* 471 F.3d 1293, 1305 (Fed. Cir. 2006) (en banc) (citations omitted). A finding of induced infringement requires “evidence of culpable conduct, directed to encouraging another’s infringement, not merely that the inducer had knowledge of the direct infringer’s activities.” *Id.* at 1306. Although §271(b) requires knowledge that the induced acts constitute patent infringement, the Supreme Court has held that liability will also attach when the defendant is willfully blind. *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068-2069 (2011). The burden is on the complainant to prove that the respondent had the specific intent and took action to induce infringement. *DSU*, 471 F.3d at 1305-06. Intent may be proven by circumstantial evidence. *Lucent Tech., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1322 (Fed. Cir. 2009).

b) Contributory Infringement

A finding of contributory infringement under 35 U.S.C. § 271(c) requires (1) direct infringement; (2) that the contributory infringer had knowledge of the patent; and (3) that the component part had no substantial non-infringing use. *Fujitsu Ltd. v. Netgear Inc.*, 620 F.3d 1321, 1326 (Fed Cir. 2010). In a section 337 case, a complainant alleging contributory infringement must also show “the accused infringer imported, sold for importation, or sold after importation within the United States, the accused components that contributed to another’s direct infringement.” *Spanion, Inc. v. Int’l Trade Comm’n*, 629 F.3d 1331, 1353 (Fed. Cir. 2010).

B. Domestic Industry

For a patent-based complaint, a violation of section 337 can be found “only if an industry in the United States, relating to the articles protected by the patent . . . concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2). This domestic industry requirement of section 337 is often described as having an economic prong and a technical prong. *InterDigital Commc’ns, LLC v. Int’l Trade Comm’n*, 707 F.3d 1295, 1298 (Fed. Cir. 2013); *Certain Stringed Musical Instruments & Components Thereof*, Inv. No. 337-TA-586, USITC Pub. 4120, 2009 WL 5134139 (Dec. 2009), Comm’n Op. at 12-14. The complainant bears the burden of establishing that the domestic industry requirement is satisfied. *See Certain Set-Top Boxes & Components Thereof*, Inv. No. 337-TA-454, ID at 294, 2002 WL 31556392 (June 21, 2002) (unreviewed by Commission in relevant part).

1. Economic Prong

Section 337(a)(3) sets forth the following economic criteria for determining the existence of a domestic industry in such investigations:

(3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned –

- (A) significant investment in plant and equipment;
- (B) significant employment of labor or capital; or
- (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337(a)(3). Thus, section 337(a)(3) requires that investments be either “significant” or “substantial.” The Federal Circuit has clarified that a quantitative analysis must be performed in order to make this determination. *Lelo Inc. v. Int’l Trade Comm’n*, 786 F.3d 879, 883 (Fed. Cir. 2015) (“The plain text of § 337 requires a quantitative analysis in determining whether a [complainant] has demonstrated a ‘significant investment in plant and equipment’ or ‘significant

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employment of labor or capital.’”). There is no threshold amount that a complainant must meet. *See Certain Stringed Musical Instruments & Components Thereof*, Inv. No. 337-TA-586, Comm’n Op. at 25-26 (May 16, 2008) (“We emphasize that there is no minimum monetary expenditure that a complainant must demonstrate to qualify as a domestic industry under the ‘substantial investment’ requirement of this section.”); *Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Comm’n Op. at 39 (Aug. 1, 2007) (“*Male Prophylactic Devices*”) (“[T]here is no mathematical threshold test.”). Rather, the inquiry depends on “the facts in each investigation, the article of commerce, and the realities of the marketplace.” *Certain Printing & Imaging Devices & Components Thereof*, Inv. No. 337-TA-690, Comm’n Op. at 27 (Feb. 17, 2011). As such, “[t]he determination takes into account the nature of the investment and/or employment activities, the industry in question, and the complainant’s relative size.” *Id.*

2. Technical Prong

The technical prong of the domestic industry requirement is satisfied when the complainant in a patent-based section 337 investigation establishes that it is practicing or exploiting the patents at issue. *See* 19 U.S.C. § 1337(a)(2) and (3); *Certain Microsphere Adhesives, Process for Making Same & Prods. Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm’n Op. at 8, 1996 WL 1056095 (Jan. 16, 1996). “The test for satisfying the ‘technical prong’ of the industry requirement is essentially [the] same as that for infringement, *i.e.*, a comparison of domestic products to the asserted claims.” *Alloc, Inc. v. Int’l Trade Comm’n*, 342 F.3d 1361, 1375 (Fed. Cir. 2003). To prevail, the patentee must establish by a preponderance of the evidence that the domestic product practices one or more claims of the patent. It is sufficient to show that the products practice any claim of that patent, not necessarily an asserted claim of that

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patent. *See Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Comm’n Op. at 38 (Aug. 1, 2007).

IV. U.S. PATENT NO. 6,787,209

A. Overview

The ’209 patent, entitled “Wrapping Material with a Z-Lock System and Methods of Making and Using the Same,” issued on September 7, 2004 to Nissim Mass; Tsafir Lior; Yair Efrati; Ilan Asis; and Hagai Paz. JX-0001. On the face of the patent, the ’209 patent is assigned to Tama Plastic Industry.³ *Id.* The ’209 patent expires on December 23, 2022. CX-0010 at ¶ 43.

The ’209 patent discloses wrapping material and methods of wrapping cotton. CIB at 4. More specifically, the ’209 patent relates to “wrapping materials that include a Z-lock system to releasably attach separate wrapping portions of a predetermined length that are held together and released at their lateral ends, and methods of using and assembling the wrapping material.” JX-0001 at 1:6-10.

1. Asserted Claims

The ’209 patent has 45 claims. Claims 1, 2, 4-14, 32, 33, 35-38, and 41-44 are asserted in this Investigation. CIB at 4. Claims 1 and 32 are independent. Claims 2 and 4-14 depend from claim 1, while claims 33, 35-38, and 41-44 depend from claim 32. The asserted claims read as follows:

1. A wrapping material, comprising: a first wrapping portion; a second wrapping portion; at least one Z-lock portion bonding said first and second wrapping portions at their respective lateral ends for holding together and releasing said first and second portions during a wrapping cycle.

³ On or about December 22, 2019, Tama Plastic Industry amended its partnership name to effectively change it to Tama Group. CX-0010 at 3 n.1; Compl. Ex. 7. The name change to Tama Group was recorded with the U.S. Patent and Trademark Office on May 8, 2020. CX-0010 at ¶ 44; *see also* Appendix C to Compl. Tama Group therefore owns all right, title, and interest in and to the ’209 patent. CX-0012.

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2. The wrapping material of claim 1, wherein said first wrapping portion and second wrapping portion are non-adhesive films.
4. The wrapping material of claim 1, wherein said first and second wrapping portions are a predetermined length and width.
5. The wrapping material of claim 1, wherein a Z-lock portion includes at least one high adhesive layer and a releasable layer.
6. The wrapping material of claim 5, wherein the releasable layer is a lowered adhesion adhesive layer.
7. The wrapping material of claims 6, wherein the releasable layer is a silicone layer.
8. The wrapping material of claim 1, wherein the lateral end of said second wrapping portion is folded into a V-shape or V-fold.
9. The wrapping material of claim 8, wherein the lateral end portion of said first wrapping portion is laid on top of and bonded to the V-shape of said second wrapping portion to form said Z-lock portion.
10. The wrapping material of claim 1, wherein the first portion and said second wrapping portions remain adhered at their respective lateral ends during winding on a roll and during the wrapping cycle.
11. The wrapping material of claim 5, wherein said first and second wrapping portions are released at the end of the wrapping cycle at a boundary between said high adhesive layer and said releasable layer.
12. The wrapping material of claim 5, wherein the releasable layer remains adhered to the lateral end of at least one of the wrapping portions at the end of the wrapping cycle.
13. The wrapping material of claim 5 wherein the high adhesive layer remains adhered to the lateral end of at least one of said wrapping portions and to an item being wrapped at the end of the wrapping cycle.
14. The wrapping material of claim 1, wherein said first portion and said second portion have a length and width sufficient to at least cover the circumference of an item being wrapped.
32. A method of wrapping; comprising: wrapping the circumference of an item using a first wrapping portion bonded at a lateral end to a second wrapping portion by at least one Z-lock portion; stopping the movement of said first wrapping portion; continuing the movement of said item; separating said first portion from said second portion at a low adhesion boundary in said Z-lock portion; and sealing the said item using the lateral end of said first wrapping portion to complete a wrapping cycle of said item, wherein stopping of

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said first wrapping portion and movement of said item separates said first portion from said second wrapping portion at the end of the wrapping cycle.

- 33. The method of claim 32, wherein said first wrapping portion and second wrapping portion are non-adhesive films and each is used to complete at least one wrapping cycle.
- 35. The method of claim 32, wherein said first and second wrapping portions are a predetermined length and width.
- 36. The method of claim 32, wherein a the Z-lock portion includes at least one high adhesive layer and a releasable layer.
- 37. The method of claim 36, wherein the releasable layer is a lowered adhesion adhesive layer.
- 38. The method of claim 36, wherein the releasable layer is a silicone layer.
- 41. The method of claim 36, wherein said first and second wrapping portions are separated at a boundary between the high adhesive layer and said releasable layer of the Z-lock portion at the end of the wrapping cycle.
- 42. The method of claim 32, wherein said first and second wrapping portions have a length and width sufficient to at least cover the circumference of the item being wrapped.
- 43. The method of claim 36, wherein the high adhesive layer remains adhered to the lateral end of said first wrapping portion and to an item being wrapped at the end of the wrapping cycle.
- 44. The method of claim 36, wherein the releasable layer remains adhered to the lateral end of said second wrapping portion at the end of the wrapping cycle.

2. Claim Construction

a) Ordinary Skill in the Art

The undersigned previously determined that a person of ordinary skill in the art with respect to the '209 patent would have at least “(a) a bachelor degree in material science, agricultural engineering, polymer science, packaging science, or a related scientific discipline, and (b) at least two years of practical experience in the area of packaging materials and processes or similar industry.” Order No. 21 at 5 (Apr. 7, 2021). The undersigned also determined that

additional graduate education could substitute for professional experience and significant work experience could substitute for formal education. *Id.*

b) Construed Claim Terms

The undersigned construed the following terms from the asserted claims as follows⁴:

TERM	CLAIM(S)	CLAIM CONSTRUCTION
“lateral end”	1, 8-10, 12, 13, 32, 43, and 44	a region adjacent to an edge transverse to the wrapping direction
“Z-lock portion”	1, 5, 9, 32, 36, and 41	the lateral end of one wrapping portion releasably attached to the folded lateral end of another wrapping portion which resembles the shape of a letter Z
“bonding”	1	joining securely by means of adhesive, heat, or pressure or by chemical bonds
“bonded”	9 and 32	joined securely by means of adhesive, heat, or pressure or by chemical bonds
“for . . . releasing said first and second [wrapping] portions” / “that . . . releases said plurality of wrapping portions”	1	Plain and ordinary meaning
“wrapping cycle”	1, 10-13 32, 33, 41, and 43-44	one complete performance of a process in which an item is wrapped

Order No. 21 at 9, 13, 15-16, 19, 23.

c) “lateral end”

Although the parties agreed to the construction of “lateral end,” Respondents now seek a clarification regarding the meaning of the agreed-upon construction. *See* RIB at 17. Specifically, Respondents assert that the meaning of the word “adjacent” needs to be further construed.

⁴ Claim construction of terms in claim 15 of the '209 patent is not discussed herein as Tama is no longer asserting that claim in this Investigation. CIB at 4 n.1.

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Respondents argue that “[a]dja-cent’ means ‘next’ such that the claim limitation of ‘bonding said first and second wrapping portions at their respective lateral ends’ requires bonding at the lateral ends (i.e., next to the edge.)” *Id.* at 17. Respondents disagree with Tama that “bonding can occur away from the edge and still be considered ‘adjacent to’ the edge.” *Id.*

Tama insists that Respondents are attempting to reargue claim construction. CRB at 3. Tama notes that “[t]he agreed definition of ‘lateral end’ is ‘*a region* adjacent to an edge transverse to the wrapping direction.” *Id.* at 4. According to Tama, “Respondents misapply the lateral end definition to require the *adhesive* be ‘adjacent’ to an edge instead of *a region* of the wrapping portion.” *Id.* Tama asserts that “Respondents’ construction would require the adhesive to extend to the edge and the lateral ends to be ‘adhered flush’ – the same argument was rejected during claim construction.” *Id.*

The undersigned agrees with Respondents that “adjacent” means “next.” Both experts testified that this is the proper understanding of the term. CX-0108C at 239:6-18; Kimmel, Tr. at 73:3-4. The undersigned disagrees, however, that this construction necessarily means that the bonding touch the edge of the wrapping portions. When applying the Parties’ agreed-upon construction, along with the understanding that “adjacent” means “next,” the claim requires “at least one Z-lock portion bonding said first and second wrapping portions at their respective [a region next to an edge transverse to the wrapping direction].” The Parties did not, therefore, agree that the claim required that the bonding occur literally *at the edge*. Rather, the Parties agreed that the bonding occur at “a region next to an edge....” As such, a person of ordinary skill in the art could conclude that the bonding occurs at a lateral end, even if the bonding does not extend to the edge itself, provided that it occurs in the *region* that constitutes a “lateral end.”

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Nor do Respondents' arguments compel a different conclusion. In support of their contention that the bonding must touch the edge, Respondents cite to several portions of the specification. *See* RIB at 18. They assert, for example, that the patent "disparages a structure where a wrapping portion is cut so that its length extends beyond the adhesive area." *Id.*; *see also id.* ("The specification's repeated derogatory statements concerning one type of material [was] the equivalent of a disavowal of that subject matter from the scope of the patent's claims.") (internal quotations and citations omitted). The undersigned already considered – and rejected – this argument in the *Markman* Order. Order No. 21 at 12. The undersigned therefore agrees with Tama that Respondents' arguments relating to "lateral end" are a thinly disguised attempt to re-litigate claim construction.

Accordingly, the undersigned now construes the term "lateral end" as "*a region next to an edge transverse to the wrapping direction.*" The undersigned, however, does not interpret this construction as requiring that the bonding touch the edge of the wrapping portion.

B. Infringement

Tama asserts that the '209 Accused Products infringe claims 1, 2, 4-14, 32, 33, 35-38, and 41-44 of the '209 patent. CIB at 4.⁵ Respondents disagree that any claims of the '209 patent are infringed. RIB at 20.

The Parties agree that the 168 wrap (old), 168 wrap (new), and the 170 wrap can be considered together for purposes of infringement. CIB at 9; RIB at 7 ("Each of these three wraps . . . operate in substantially the same way with respect to the claims of the '209 patent."). The

⁵ Tama argues that Dr. Howle "is not a [person of ordinary skill in the art] nor qualified to evaluate the '209 patent claims." *Id.* at 8. The undersigned finds that this argument is waived, as Tama did not assert it in its pre-hearing brief. *See* G.R. 9.2

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Parties disagree, however, as to whether Yajia Model No. YJ168169 (the “169 wrap”) is a part of this Investigation.

1. 169 Wrap

a) Adjudication

Respondents assert that they “properly introduced the 169 wrap as a redesign into this Investigation under the Commission’s guiding precedent.” RIB at 13. Respondents note that the 169 wrap falls within the scope of the investigation. *Id.* at 14. Respondents explain that they “imported reduced-size sample rolls” to both SMA and Tama’s counsel. *Id.* Respondents further state that the 169 wrap is fixed in design. *Id.* at 15. Finally, Respondents assert that they disclosed the 169 wrap during discovery. *Id.*

Tama argues that the 169 wrap “is nothing more than a hypothetical product and does not warrant adjudication.” CRB at 23. Tama notes that “Respondents never imported any actual 169 wrap into the United States and have no plans to import it.” *Id.* Tama asserts that “[t]he lack of importation also serves to demonstrate the 169 wrap is not fixed in design.” *Id.* Tama further contends that “Respondents never produced a functioning product.” *Id.* at 24.

The Commission’s test for determining whether a respondent has met its burden for adjudication of a redesigned or alternative product includes four factors: (1) whether the product is within the scope of the investigation; (2) whether it has been imported; (3) whether it is sufficiently fixed in design; and (4) whether it has been sufficiently disclosed by respondent during discovery. *Certain Human Milk Oligosaccharides & Methods of Producing the Same*, Inv. No. 337-TA-1120, Comm’n Op. at 18 (June 8, 2020) (“*Human Milk*”). Additionally, the Commission has a “policy in favor of adjudicating redesigns to prevent subsequent and potentially burdensome

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proceedings that could have been resolved in the first instance in the original Commission investigation.” *Id.*

The undersigned finds that the second factor weighs against including the redesigns in the Investigation. Respondents admit that they never imported the 169 wrap into the United States.⁶ *See* RIB at 14. While Respondents imported part of the product (*i.e.*, “sample rolls”), this is not the same as importing the actual product. The undersigned notes, however, that importation is not required for a redesigned product to be considered. *See Human Milk*, Comm’n Op. at 18 n.21.

The undersigned finds that the remaining three factors weigh in favor of adjudication of the redesigns. Tama does not dispute that the first factor is met. *See* CRB at 23-25. Additionally, the undersigned finds that the third factor is met. Tama’s only argument as to why the design is not fixed is that “[h]ad it been fixed in design, Respondents could have easily imported, produced, and tested it in the United States like all its other wraps.” *Id.* at 23-24. This argument improperly conflates the second and third factors. The evidence shows that the 169 wrap is, in fact, fixed in design. *See* CX-0104C at 79:8-13, 98:12-17, 104:20-105:1 (testimony that the 169 wrap has not changed since the November sample was sent to Tama).

As to the fourth factor, the undersigned concludes that Respondents sufficiently disclosed the 169 wrap during discovery. Respondents produced design and manufacturing documents on October 28, 2020 and produced sample rolls on November 13, 2020. RIB at 15 (citing RPX-0001; RX-0008C). Respondents also provided “corporate witnesses who could testify about the design, structure, function, and operation of the 169 wrap.” *Id.*

Tama does not dispute these facts. Instead, Tama asserts that it was unable to “perform a fulsome infringement analysis” without access to the full version of the 169 wrap. CRB at 24.

⁶ Respondents justify this decision by noting that “[a] full-size roll weighs more than 200 pounds, making sample rolls easier to ship and examine.” RIB at 14.

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Tama does not explain, however, how only having access to the sample wraps prevented it from determining infringement.⁷ Tama does not, for example, assert that the portion of the wrap that was not produced would have any relevance to the infringement analysis. In fact, with respect to the Accused Products, Dr. Kimmel testified that there were “no differences” between the partial samples and the full-size samples that would “impact [his] opinions.” CX-0003C at Q/As 131, 207, 289. Tama does not explain why that would be any different for the 169 wrap. Additionally, as explained below, it is evident from the design drawings that the 169 wrap lacks the requisite Z-lock portion. Tama does not explain how the production of the full version of the 169 wrap would have changed this fact.

Tama also states that it would not “be advisable for Tama to use the design drawings because the actual Yajia wraps departed from their respective design drawings.” CRB at 24-25. The evidence shows, however, that the differences between the produced wraps and the technical drawings were irrelevant to a determination of infringement. CX-0003C at Q/As 134-135, 210-211, 288-289 (testimony from Dr. Kimmel that the differences did not impact his conclusions). Thus, Tama’s concern is unfounded.

Accordingly, the undersigned finds that the factors set forth in *Human Milk* support the adjudication of the 169 wrap in this Investigation.

b) Infringement

Tama did not make any infringement allegations as to the 169 wrap or introduce any testimony from its expert. Respondents, in turn, argue that the 169 wrap does not infringe any asserted claim of the ’209 patent. RIB at 25. Specifically, Respondents argue that the 169 wrap

⁷ Although Tama writes that its expert, Dr. Kimmel, “could not determine the structure or function of [the] 169 wrap based on the established record,” it does not support this statement with any testimony from Dr. Kimmel himself. See CRB at 25.

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does not have a Z-lock portion. *Id.* Respondents explain that “[t]he CALJ’s construction of ‘Z-lock’ requires that one of the lateral ends be folded.” *Id.* “But the 169 wrap is not folded over itself nor does it have a shape that resembles the letter Z.” *Id.*

The undersigned agrees that the 169 wrap does not have a “Z-lock portion.” The undersigned construed “Z-lock portion” as “the lateral end of one wrapping portion releasably attached to the folded lateral end of another wrapping portion which resembles the shape of a letter Z.” Order No. 21 at 13. The evidence shows, however, that the 169 wrap does not resemble the shape of a letter Z:



RX-0008C; *see also* RX-0086C at Q/A 79. As such, the undersigned finds that the 169 wrap does not include a “Z-lock portion.” Because both asserted independent claims include a “Z-lock portion,” the undersigned finds that the 169 wrap does not infringe any of the asserted claims of the ’209 patent.

2. Claim 1

Tama asserts that the Accused Products infringe claim 1 of the ’209 patent. Respondents dispute that the limitation “at least one Z-lock portion bonding said first and second wrapping portions at their respective lateral ends for holding together and releasing said first and second

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portions during a wrapping cycle” is met.⁸ RNCL at ii. Respondents do not dispute that the remaining limitations are met.

a) “bonding . . . at their respective lateral ends”

Tama asserts that the Accused Products “have an adhesive at the lateral end – between the edge and the fold (starting from .3 cm to 6 cm from the edge).” CIB at 14. Tama disagrees that the adhesive must extend all the way to the edge. *Id.*

Respondents assert that “[t]he bond in the Yajia products is not at the lateral end of a wrapping portion under any construction of ‘bonded or bonding.’” RIB at 27. Respondents argue that “the adhesive in [the 170 wrap] is 6cm [sic] away from the edge” and “[t]he adhesive layer in [both the 168 wrap (old) and the 168 wrap (new)] is located between 1.5 cm and 3 cm away from the edge.” *Id.* at 28, 29. According to Respondents, “[t]he Yajia products do not infringe because 1.5 cm, 3 cm, and 6 cm are too far away from the edge to be ‘adjacent [i.e., next] to a lateral end.’” *Id.* at 29.⁹

The undersigned finds that the Accused Products have “at least one Z-lock portion bonding said first and second wrapping portions at their respective lateral ends.” The evidence shows that, in the 168 wrap (old), there is adhesive located 0.8 cm from the edge:

There are two adhesives included in the Z-lock portion of YJ168168 (old). The first is a transfer adhesive bonded to the first wrapping portion, and the second is another adhesive that bonds the release-coated film to the second wrapping portion. The two adhesive layers are what securely joins the wrapping portions so that they are

⁸ In its reply brief, Tama states that Respondents challenge whether the Accused Products meet the “releasing” limitation of this phrase. CRB at 8-10. Respondents do not make this noninfringement argument in their briefs. Rather, Respondents only touch on “releasing” in addressing infringement under the doctrine of equivalents. *See* RIB at 29-31. Because Tama did not make a doctrine of equivalents argument, it is unnecessary to address Respondents’ position on “releasing.”

⁹ Respondents also state that “Tama . . . could not identify an area of the wrapping portion that is not a claimed ‘lateral end.’” RIB at 1. Respondents do not assert, however, that the claim term is indefinite. *See* RIB at 34 (“Respondents did not contest invalidity at the hearing.”). Nor did they make this argument during the *Markman* phase of the Investigation. *See* Order No. 21. Thus, the only inquiry before the undersigned is whether the Accused Products meet the limitations of the asserted claims – not whether the term “lateral end” “inform[s] those skilled in the art about the scope of the invention with reasonable certainty.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 910 (2014).

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held together at their lateral ends while feeding into a Deere machine and as they move throughout the Deere machine. Additionally, there is a small distance from the edge of these adhesives to the perforation. CDX-0004.19C and CDX-0004.20C are respective pictures of my inspection of the partial sample and full sample that I examined which demonstrates this small distance. From my inspection of the exemplar product YJ168168 (old), the distance between the perforation and releasable layer is only 0.8 cm.

CX-0003C at Q/A 139. For the 168 wrap (new), the adhesive is located between 0.3 and 0.8 cm from the edge, and, for the 170 wrap, the adhesive is located between 7.5 and 8 cm from the edge. *See id.* at Q/A 216 (testifying that the distance was 0.8 cm for the partial sample wrap and 0.3 cm for the full sample of the 168 wrap (new)); *id.* at Q/A 296 (testifying that the distance was between 7.5 and 8 cm for the 170 wrap).¹⁰

The evidence further shows that a person of ordinary skill in the art would understand that the placement of the adhesive from 0.3 to 8 cm from the edge constitutes “bonding . . . at their respective lateral ends.” Dr. Kimmel testified that “[t]he small gap between the edge and adhesive does not change the fact that the adhesives of the Z-lock bond at the lateral ends. The distance is very small (.8 cm) as compared to the entire length of one wrap (about 21 meters).” *Id.* at Q/A 139; *see also id.* at Q/As 216, 296 (offering similar testimony for the 168 wrap (new) and 170 wraps). Even Dr. Howle admitted during his deposition that the adhesive was placed at the lateral end.

Q But there’s no dispute that the Yajia products have adhesive somewhere between 0.3 centimeters and 8 centimeters from the perforation, correct?

A That is correct, yes. Starting there and moving away from that perforation.

¹⁰ Respondents’ expert provided different calculations for the 168 wrap (old) and 168 wrap (new). He states: “The adhesive layer in model number YJ168168 (both old and current versions) is located between 1.5 cm and 3 cm away from the edge.” RX-0086C at Q/A 105. While Dr. Howle relied on design drawings for this calculation, Dr. Kimmel performed actual measurements. *Id.* (citing to JX-022C); CX-0003C at Q/As 139, 216, 296. Additionally, Respondents do not assert that the difference in these calculations affects the analysis.

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Q Correct. And there's no dispute that at that area, that adhesive securely bonds the two wrapping portions together, at least where there's adhesive. Correct?

A. Yes, that's correct.

Q. Okay. And that portion where they're bonded is part of the lateral end? Correct? . . .

A I would say that portion where they're bonded is the lateral end.

CX-108C at 124:10-125:6. Accordingly, because the two wrapping portions are bonded together at their respective lateral ends, the undersigned finds that this claim limitation is met.

b) "wrapping cycle"

Respondents assert that the Accused Products do not meet the "wrapping cycle" limitation. First, Respondents argue that "the claims as construed require 'an item' and a 'machine,' which Respondents do not sell or provide to end users." RIB at 22. Second, Respondents argue that "Tama fails to show actual infringement by Respondents because Tama uses evidence of how its own product, TamaWrap, works as a substitute for how Respondents' products work." *Id.*

i) Item or Machine

Respondents argue that the Accused Products "cannot directly infringe the independent claims from the '209 patent as Yajia does not sell the external components that the construed claims require." *Id.* at 22. According to Respondents, the undersigned construed "wrapping cycle" as "a process, or method." *Id.* Respondents assert that "a wrapping cycle cannot be performed without an item to wrap and a machine to perform the wrapping cycle." *Id.* Since Yajia does not sell anything that can provide the force required by the wrapping cycle, Respondents contend that "direct infringement by any asserted claim is impossible." *Id.* at 23. Respondents further assert that "the CALJ's construction specifically requires an item to wrap, and Yajia does not sell any such item." *Id.*

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Tama explains that “there is no method requirement recited in the apparatus claims . . . because they claim a structure that is capable of performing a function.” CIB at 16. Despite this fact, Tama notes that “Respondents continue to press forward” with an argument that “the words ‘wrapping cycle’ in the apparatus claims ‘require[] the performance of a wrapping cycle’ in the apparatus claims.” *Id.* Tama explains: “Because the apparatus claims do not require the performance of a method, they likewise do not require an item or machine.” *Id.* Tama notes: “The fact that Respondents do not sell Deere Machines or cotton bales has nothing to do with the capability of the Yajia wraps they sell to wrap a cotton bale.” *Id.*

Claim 1 does not require either an “item to be wrapped” or a machine. JX-0001, cl. 1. While the undersigned construed “wrapping cycle” as “one complete performance of a process in which an item is wrapped,” Respondents do not explain how this construction imposes a requirement that Respondents sell either an item to be wrapped or a machine in order to infringe the claim. *See* RIB at 22-23.¹¹ Furthermore, contrary to Respondents’ representations, the undersigned did not find that “wrapping cycle” is a method. Instead, the undersigned found that “wrapping cycle” was an apparatus claim that did not improperly mix apparatus and method elements. Order No. 21 at 21-22. Thus, Respondents are incorrect in their assertion that claim 1 requires *actual* performance of a wrapping cycle rather than the *capability* to perform a wrapping cycle. For these reasons, the undersigned is not persuaded by Respondents’ argument that claim 1 requires an “item to be wrapped” or a “machine.”

¹¹ Respondents’ expert only makes this noninfringement argument with respect to claim 32. RX-0086C at Q/A 117. Dr. Howle also agreed that “the CALJ found that wrapping cycle is not a method in the apparatus claims.” *Id.* at Q/A 118; *see also* CX-0108C at 89:16-19 (testimony from Respondents’ expert acknowledging that “in those apparatus claims, there is not a method step that’s required to be performed”).

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ii) Evidence of Direct Infringement

Respondents argue that “Tama fails to show direct infringement” by the Accused Products because its expert “relied on an explanation of how TamaWrap works to try to prove how the Yajia products operate.” RIB at 23. According to Respondents, “Dr. Kimmel admitted that he performed no testing of the Yajia wraps in a harvester,” “did not personally witness any testing in the field of a Yajia wrap, and did not watch any videos of someone else using a Yajia wrap in a harvester.” *Id.* at 23-24.

Respondents do not identify any instance in which Dr. Kimmel relied on how TamaWrap operates to prove infringement of the Accused Products with respect to claim 1. Instead, the examples cited by Respondents relate to claim 32. *See* RIB at 23. Additionally, as noted above, claim 1 does not require the performance of a method. As such, it was not necessary for Dr. Kimmel to demonstrate how a wrapping cycle is performed to establish that claim 1 is infringed.

iii) Conclusion

As explained above, the undersigned is not persuaded by either of Respondents’ noninfringement positions with respect to “wrapping cycle.” Additionally, the evidence shows that the Accused Products meet this limitation. CX-0003C at Q/As 140-141, 217-219, 297-298.

c) Conclusion

Accordingly, for the reasons set forth above, the undersigned finds that the Accused Products infringe claim 1.

3. Claims 2 and 4-14

Tama asserts claims 2, 4-7, and 10-14 against the 168 wrap (old) and claims 2 and 4-14 against the 168 wrap (new) and 170 wrap. CIB at 4-5.

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Respondents do not dispute that the additional limitations of claims 2 and 4-14 are met. *See generally* RNCL; RIB at 31. Additionally, the evidence shows that the Accused Products meet these limitations. CX-0003C at Q/As 142-161, 220-243, 299-322. Accordingly, the undersigned finds that the 168 wrap (old) infringes claims 2, 4-7, and 10-14 and the 168 wrap (new) and 170 wrap infringe claims 2 and 4-14.

4. Claim 32

Tama asserts that the Accused Products infringe claim 32 of the '209 patent. Respondents dispute that any limitation of this claim is met. RNCL at ii.

a) “bonded at a lateral end”

Respondents argue that the Accused Products do not meet this limitation for the same reasons as with respect to claim 1. RIB at 27-31. For the reasons discussed above, the undersigned finds that the Accused Products meet this limitation.

b) “wrapping cycle”

Respondents assert that the Accused Products do not meet this limitation for the same reasons as claim 1.

i) Item or Machine

As with claim 1, Respondents assert that the Accused Products “cannot directly infringe” claim 32 “as Yajia does not sell the external components that the construed claims require.” RIB at 22.

Tama asserts that “Respondents’ argument that they do not directly infringe the method claims because they do not sell an ‘item’ or ‘machine’ gets the law completely wrong.” CRB at 12. Tama notes that “[i]nfringement of method claims do not require the sale of items,” but are instead “infringed when one performs each claimed method step.” *Id.* “Thus, while claim 32 recites

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‘wrapping the circumference of an item,’ there is no requirement that Respondents sell an item – they must only wrap one.” *Id.*

A method claim is infringed when the steps of the method are performed. *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1022 (Fed. Cir. 2015) (en banc). There is no requirement that one entity must sell or supply all of the components necessary to perform the steps. *See, e.g., Harris Corp. v. Ericsson Inc.*, 417 F.3d 1241, 1256 (Fed. Cir. 2005) (explaining that a method claim is directly infringed “only by one who uses the system, not by one who makes or sells the components of the system”). Indeed, a requirement that one entity sell all of the components necessary to practice the claim would be inconsistent with 35 U.S.C. § 271(c), which specifically provides liability for contributory infringement. As such, the undersigned rejects Respondents’ argument that Respondents must provide both the “item to be wrapped” and the machine to the end users to be liable for infringement of claim 32.

ii) Evidence of Direct Infringement

Respondents assert that “Tama fails to introduce direct evidence of the operation of Yajia wraps, presenting instead unreliable circumstantial and hearsay evidence.” RRB at 9. Respondents explain, for example, that Dr. Kimmel “does not cite to any instances of use of a Yajia product in a harvester.” *Id.* Respondents also criticize Dr. Kimmel for his assumption that the Accused Products were designed to work in Deere Machines in the same manner as TamaWrap. *Id.* at 9-10.

Tama argues that “[n]one of Respondents’ criticisms of Dr. Kimmel’s analysis [have] any merit.” CRB at 11. Tama explains that Dr. Kimmel used information about how TamaWrap interacts with the Deere Machine in order “to inform his understanding of how a Deere Machine worked.” *Id.* at 12. Tama notes that Dr. Kimmel then “provided his opinion, based on Yajia wraps’ structure, regarding how those wraps interact with a Deere Machine to wrap cotton.” *Id.* Tama also

states that “Respondents provide no evidence that the wrapping mechanism of a Deere Machine operates any differently with the accused products than with TamaWrap.” *Id.*

The undersigned is not persuaded by Respondents’ argument that actual testing of the Accused Products is required to prove infringement. “Direct infringement can be proven by circumstantial evidence.” *Vita-Mix Corp. v. Basic Holding, Inc.*, 581 F.3d 1317, 1327 (Fed. Cir. 2009). Thus, Dr. Kimmel was not required to actually perform the method using the Accused Products in order to form an opinion that the Accused Products infringe.

The undersigned further finds that Tama met its burden to show that claim 32 is practiced by using the Accused Products. Dr. Kimmel explained how each of the steps of claim 32 is performed using the Accused Products. While he relied on his knowledge as to how a Deere Machine responds to TamaWrap, he explained why it was appropriate to assume that the Accused Products operate in the same way. First, he explained that Yajia’s corporate representative testified that “Yajia used TamaWrap™ as a reference to develop [the Accused Products].” CX-0003C at Q/As 173, 255, 336. He also noted that the Accused Products were “designed for use in a Deere Machine.” *Id.* Second, Dr. Kimmel stated that he reviewed the structure of the Accused Products and that this review confirmed that they “operate[] in the same manner as TamaWrap™.” *Id.* For example, in explaining how the 168 wrap (old) performs the step of “stopping the movement of said first wrapping portion,” Dr. Kimmel explains that “the Deere Machine has a sensor that is able to recognize a label on the wrapping portion that causes the picker to stop feeding the roll.” *Id.* at Q/A 175; *see also id.* at Q/As 257, 338 (providing similar testimony with respect to the 168 wrap (new) and the 170 wrap). He references an animation by Tama that shows how the step is performed using TamaWrap. *Id.* Dr. Kimmel then notes that the Accused Products likewise have a bar code label “in the same location to that of TamaWrap™.” *Id.* Given this evidence, the

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undersigned finds it reasonable to infer that the bar code on the Accused Products serves the same function as that of TamaWrap.

Respondents, in turn, do not argue that the Accused Products operate in a different manner than that detailed by Dr. Kimmel. While Dr. Howle testified that the Accused Products “were originally designed for use in a Chinese company’s machine,” he failed to provide evidence that the Accused Products do not, in fact, operate in the way that Dr. Kimmel suggests. *See* RX-0086C at Q/As 127-130, 134-136. The undersigned therefore finds that Respondents failed to rebut the evidence set forth by Tama that demonstrates the Accused Products meet this limitation.

iii) Conclusion

As explained above, the undersigned is not persuaded by either of Respondents’ noninfringement positions with respect to “wrapping cycle.” Additionally, the evidence shows that this limitation is met. CX-0003C at Q/As 172-179, 254-261, 335-342. Accordingly, the undersigned finds that the Accused Products meet this limitation.

c) Performance of a Method

Tama asserts that the evidence shows that the method is performed “by end users, including cotton farmers and those testing the wraps.” CIB at 19. Tama also notes that “Respondent SMA stipulated they imported and tested the Yajia wraps in the United States.” *Id.* According to Tama: “Even absent the stipulation, evidence that Respondents used the Yajia wraps in the United [S]tates is overwhelming.” *Id.*

Respondents argue that “[i]nfringement of the method claim requires performance of the claim steps *by the Respondents*.” RRB at 8-9 (emphasis in original). Respondents state that “Tama fails to prove – because it cannot – that a Respondent ran a wrap through a Deere Machine to wrap a cotton bale in the United States.” *Id.* at 8.

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The undersigned finds that Tama did not establish that SMA performed the steps of claim 32 itself. In support of its argument, Tama relies on a stipulation between the Parties. CIB at 19 (citing CX-0535C). This stipulation does not, however, state that SMA performed the method of claim 32. Rather, SMA stipulates that it imported the Accused Products into the United States and that it “tested, marketed and/or sold the YJ168168 (old), YJ168168 and YJ168170 cotton wraps in the United States under a single SMA product code, PSCW24.” CX-0535C at ¶¶ 2-3. Because of the inclusion of the word “or,” it is not apparent which of the Accused Products SMA tested in the United States. It is also not clear what this testing entailed. The undersigned finds that this evidence, standing alone, is insufficient to establish that SMA directly infringed claim 32.¹²

The undersigned does find that Tama established that end users perform the steps of claim 32 using the Accused Products.¹³ Respondents confirm that SMA distributed samples of the Accused Products to its customers for testing and that it sold the Accused Products to end users.¹⁴ CX-0104C at 95:22-97:16 (testimony from Yajia’s General Manager that it sent samples of the 168 wrap (old) to SMA for testing by its customers in the United States); *see also* RX-0084C at Q/As 31-33 (testimony from SMA’s National Sales Manager that SMA provided the Accused Products to customers for testing). The evidence further shows that end customers use the Accused Products in the field to wrap bales of cotton. RX-0086C at Q/As 31-34. Dr. Kimmel testified that

¹² SMA admitted that it tested the Accused Products during the course of the Investigation, at the request of its expert. *See* RX-0084C at Q/As 35-39. The undersigned finds that this testing is insufficient to serve as a basis for a finding of direct infringement by SMA. *See ACCO Brands, Inc. v. ABA Locks Mfr. Co., Ltd.*, 501 F.3d 1307, 1313 (Fed. Cir. 2007) (finding that there was no evidence of direct infringement when the only instance of performance of the method was by the plaintiff’s expert).

¹³ The undersigned disagrees with Respondents that direct infringement of claim 32 requires evidence that Respondents themselves practice the method. Rather, Tama need only show that “all steps of a claimed method are performed by or attributable to a single entity.” *Akamai*, 797 F.3d at 1022.

¹⁴ Tama did not argue that SMA should be held responsible for any direct infringement by its customers. *See Akamai*, 797 F.3d at 1022 (“Where more than one actor is involved in practicing the steps, a court must determine whether the acts of one are attributable to the other such that a single entity is responsible for the infringement. We will hold an entity responsible for others’ performance of method steps in two sets of circumstances: (1) where that entity directs or controls others’ performance, and (2) where the actors form a joint enterprise.”).

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such use necessarily requires performing the steps of claim 32. CX-0003C at Q/As 172-179, 254-261, 335-342. The undersigned finds that this circumstantial evidence is sufficient to show that end users perform the method of claim 32 using the Accused Products.

d) Indirect Infringement

Tama asserts that “Yajia infringes claim 32 at least indirectly since Yajia knew of the ’209 Patent and the acts Yajia induced (testing by SAM [sic]) constitute patent infringement.” CIB at 21. Tama argues that both SMA and Yajia had knowledge of the patent. *Id.* at 21-22. It further states that “[c]opying of a patented product, as Yajia did here, demonstrates knowledge that Yajia knew its actions would be causing SMA and farmers to infringe.” *Id.*

Respondents argue that there is no contributory or induced infringement. According to Respondents, “Tama’s allegations regarding indirect infringement rely on conclusory statements and a series of assumptions.” RIB at 31. Respondents assert that “Tama fails to meet the scienter requirement.” RRB at 12. According to Respondents, “Tama presents zero evidence of Respondents’ subjective belief regarding infringement.” *Id.* “Further, the evidence points away from a belief of a high risk of infringement and away from direct copying.” *Id.*

The undersigned finds that Tama has not met its burden to establish indirect infringement.¹⁵ As noted above, the undersigned found that only end users directly infringe claim 32. Thus, to prevail on indirect infringement, Tama must establish that Respondents induced these end users to infringe. Tama has not done so. Tama focuses its argument on the inducement of infringement by SMA. CIB at 21. Tama does not explicitly assert that Respondents induce infringement of the end

¹⁵ The undersigned finds that Tama has waived its claim that Respondents contribute to the infringement of the ’209 patent. Tama does not specifically make this assertion in its briefs. *See* CIB at 21-22 (asserting that “the acts Yajia induced (testing by SAM) constitute patent infringement,” but failing to assert contributory infringement). Nor does Tama meet its burden to show that the Accused Products lack a substantial non-infringing use.

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users. *See id.* at 21-22. Neither did Tama assert that Respondents took any action with respect to the end users. Indeed, Tama stated that “Yajia also instructed SMA that farmers would already know how to use Yajia wrap based on experience with TamaWrap.” *Id.* at 22. Without evidence that Respondents “actively and knowingly aid[ed] and abett[ed] another’s direct infringement,” the undersigned cannot find that Respondents indirectly infringed claim 32.

e) Conclusion

The undersigned finds that the end users of the Accused Products directly infringe claim 32 when using the Accused Products. The evidence, however, does not support a finding of indirect infringement by Respondents. Accordingly, Respondents do not infringe claim 32.

5. Claims 33, 35-38, and 41-44

The undersigned finds that Respondents do not infringe claims 33, 35-38, and 41-44, which depend from claim 32. *See Muniauction Inc. v. Thomson Corp.*, 532 F.3d 1318, 1328-29 n.5 (Fed. Cir. 2008) (“A conclusion of noninfringement as to the independent claims requires a conclusion of noninfringement as to the dependent claims.”)

C. Technical Prong of the Domestic Industry Requirement

Tama asserts that TamaWrap practices all asserted claims.¹⁶ CIB at 23-28; CRB at 13. Respondents disagree. RIB at 32-34. The entirety of Respondents’ argument is set forth below:

TamaWrap requires a machine and an item to infringe, but Tama does not sell these products, just as Respondents do not. Dr. Kimmel refers to operation in Deere machines to explain how claim 1 is practiced by TamaWrap. CX-0003C (Kimmel) at Q&A 56. He further relies on Deere machines, and the same Tama animation that he uses to purportedly show infringement of the Yajia products, to explain how TamaWrap practices claim 32 of the ’209 patent. CX-0003C (Kimmel) at Q&A 91-97; *see also* JX-0028. Thus, as with the Yajia products, a machine (in this case, a Deere machine) is needed for TamaWrap to perform the method claim and Tama does not sell a Deere machine.

¹⁶ According to Tama, “Respondents do not dispute any analysis regarding the dependent claims.” CIB at 23. While this may be true, Respondents do dispute that TamaWrap practices the independent claims from which the dependent claims depend. RNUL at ii.

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Id. at 34.

Respondents make the same argument about TamaWrap and the technical prong as they do for the Accused Products and infringement. *See* Section IV.B.2 and IV.B.4, *supra* (arguing that they cannot infringe because Respondents do not sell the external components required by the construed claims). Thus, for the reasons set forth above with respect to infringement, the undersigned rejects Respondents' argument that Tama must provide both the item and the machine to practice claims 1 and 32. *Id.* Beyond a reference to claims 1 and 32, Respondents do not address the limitations of those claims nor do they address the dependent claims. *See* RIB at 34. They have therefore waived any arguments that TamaWrap does not practice the specific limitations of the asserted claims of the '209 patent. G.R. 13.1.

The evidence shows that TamaWrap practices claims 1 and 32 of the '209 patent.¹⁷ *See, e.g.,* JX-0027C; JX-0028; CPX-0006; CX-0007C at Q/As 3, 4, 49-62, 72-73, 79, 81-85, 88; CX-0008C at Q/As 3, 7-30, 33, 37-38; CX-0103. For example, Dr. Kimmel provided detailed testimony on the practice of TamaWrap for both claims. *See* CX-0003C at Q/As 53-56 (claim 1), 91-97 (claim 32); *see also* CDX-0004.3C, .4C, .6C-.7C, .10C-14C; CDX-0007.4C-.7C, .10C-.15C; Kimmel, Tr. at 107:10-20, 118:9-21. In addition, Respondents' own expert admitted that under the current claim construction, there is "no reason to find that the domestic industry technical prong was not met." CX-0108C at 188:1-190:11-21.

Accordingly, the undersigned finds that Tama has satisfied the technical prong of the domestic industry requirement for the '209 patent.

¹⁷ Because Tama need only show that TamaWrap practices one claim of the Asserted Patent, the undersigned need not reach whether TamaWrap practices the dependent claims. *See Certain Male Prophylactic Devices*, Comm'n Op. at 38.

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D. Validity

Respondents have not challenged the validity of the '209 patent.¹⁸ RIB at 34; *see also Lannom Mfg. Co., Inc. v. U.S. Int'l Trade Comm'n*, 799 F.2d 1572, 1580 (Fed. Cir. 1986.) (“We conclude, therefore, that Congress did not authorize the Commission to redetermine patent validity when no defense of invalidity has been raised.”)

V. ECONOMIC PRONG OF THE DOMESTIC INDUSTRY REQUIREMENT

Tama asserts that it satisfies prongs (A), (B), and (C) of 19 U.S.C. § 1337(a)(3). CIB at 37-53. Respondents disagree and argue that Tama’s domestic industry investments are insignificant and insubstantial. RIB at 34; RRB at 21.

A. Deere Investments

Tama asserts that John Deere & Co (“Deere”)¹⁹ expenses should count toward the establishment of a domestic industry. CIB at 30-31. Tama contends that it authorized and encouraged Deere to practice the method claimed in the '209 patent by running TamaWrap through Deere Machines.²⁰ *Id.* at 31. Tama claims that “authorization, by implied license or otherwise, permits the Commission to include investments in the critical Deere Machines that practice those methods to establish a domestic industry.” *Id.* at 34. According to Tama, “[d]ecades of cooperation, interactions, and testing” [REDACTED]. *Id.* at 31. Tama explains that [REDACTED] the method claims of the '209 patent, Tama never once accused them of infringing and [REDACTED].” *Id.* at 32. Thus, Tama claims that it “straightforwardly allowed John Deere to use the patented method.” *Id.* Tama argues that there

¹⁸ Respondents maintain that the term “wrapping cycle” is indefinite and preserve their right to appeal the undersigned’s determination that this term is not indefinite. RNCL at i; *see also* Order No. 21 at 20-23.

¹⁹ Deere is a third party to this Investigation.

²⁰ Deere Machines refer to Deere’s “On-Board Module Harvesters,” including model numbers 7760, CP690, and CS690. CIB at 3.

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was no need for a written license agreement, and in any case, the written agreement between the Parties “ [REDACTED] .” *Id.* at 32-33.

In addition, Tama claims that “[s]imple acquiescence to John Deere’s practice of the ’209 Patent with TamaWrap is also sufficient to establish an implied license.” *Id.* at 34.

Tama also asserts that expenses relating to the Deere Machines should be considered because those machines were essential to the exploitation of TamaWrap. *Id.* at 34-35; CRB at 14-15. For example, Tama submits that “TamaWrap cannot function on its own without Deere Machines and serves no other purpose than to be used with Deere Machines.” CIB at 35. Tama asserts that “integral products are included whether or not a license exists.” CRB at 15.

Respondents dispute that Deere is an implied licensee. RIB at 39. According to Respondents, Deere invented and manufactured the harvester machine while Tama invented and manufactured the module wrap. *Id.* at 40. Respondents contend that “Deere did not contribute to making the invention of the ’209 patent.” *Id.* Respondents further assert that the [REDACTED] [REDACTED] between Tama and Deere “ [REDACTED] .” *Id.*

Respondents argue that, even if Deere is an implied licensee, Tama still cannot rely on those expenditures because “Deere is not an implied licensee that makes domestic industry products or components thereof.” *Id.* at 42. Because Deere’s expenditures were directed to the Deere Machines and not the domestic industry product or components thereof, Respondents contend that they cannot be used to support Tama’s domestic industry. *Id.* at 42-43. Respondents submit that there is no Commission precedent that a complainant can rely on the investments made in a non-patented article by a non-party, non-licensee. RRB at 18-19.

The Commission has found that investments by a licensee who makes domestic industry products may count toward a complainant’s domestic industry. *See, e.g., Certain Magnetic Tape*

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Cartridges, Inv. No. 337-TA-1058, Comm’n Op. at 41-46 (Apr. 9, 2019)²¹; *Certain Electronic Imaging Devices*, Inv. No. 337-TA-850, Comm’n Op. at 92-95 (April 21, 2014). Moreover, in certain circumstances, the Commission has allowed a complainant’s own non-patented articles that are necessary to exploit the asserted patents to qualify toward a domestic industry. *See, e.g., Certain Sleep-Disordered Breathing Treatment Sys. and Components Thereof* (“*Sleep-Disordered Breathing Treatment Sys.*”), Inv. No. 337-TA-890, Initial Det. at 147-50 (Aug. 21, 2014), *not reviewed in relevant part* by Comm’n Notice (Oct. 16, 2014); *Certain Dental Implants*, 337-TA-934, Initial Det. at 128-30 (Oct. 27, 2015); *not reviewed in relevant part* by Comm’n Notice (Jan. 14, 2016).

However, the facts in those investigations are not analogous to the facts here. There is no dispute that [REDACTED] between Tama and Deere does not exist. *See* CX-0124C at 8. There is also no dispute that Deere does not make TamaWrap and does not provide any components to Tama to make TamaWrap. *See* Inbar, Tr. at 19:6-14. Deere is therefore not an actual licensee that makes domestic industry products or components. Furthermore, the Deere Machines are not asserted as domestic industry products nor are they Tama’s own non-patented articles. *See* CX-0004C at Q/As 36, 65. The undersigned is not aware of any Commission precedent broadening domestic industry to allow a complainant to rely on a third party’s, or even an implied licensee’s, investments in a non-patented article.²² Nor has Tama presented any such Commission

²¹ In *Certain Magnetic Tape Cartridges*, the Commission found that correspondence between complainant and licensee memorialized the Parties’ mutual understanding that the licensee had a license to have patented products made. *See id.* at 42. Those facts are not analogous to this Investigation where there is no [REDACTED] the ’209 patent.

²² In addition, contrary to Tama’s assertion, there is at least some evidence that TamaWrap works with machines other than the Deere Machines. *See* CX-0104C at 53:11-13.

precedent.²³ The undersigned therefore finds no basis for crediting Deere's expenditures towards Tama's alleged domestic industry.

B. Plant and Equipment

As to investments in plant and equipment, Tama only asserts investments made by Deere. See CIB at 37-38. Because the undersigned has already determined that Deere's investments do not qualify toward a domestic industry, Tama has failed to satisfy the economic prong of the domestic industry requirement under section 337(a)(3)(A).

C. Labor and Capital

Tama submits its total domestic investments in labor and capital as summarized in the table below ([REDACTED]).²⁴

	Investment Attributable to TamaWrap
Labor Expense	[REDACTED]
Administration Expenses	[REDACTED]
Travel Expenses	[REDACTED]
RFID Purchases	[REDACTED]
LLDPE Purchases	[REDACTED]
Administration Fee Paid [REDACTED]	[REDACTED]
Ambraco Investment	[REDACTED]
Total	[REDACTED]

²³ Tama cites to the Initial Determination in *Certain Multi-Stage Fuel Vapor Canister Sys. & Activated Carbon Components Thereof* for the proposition that "authorization, by implied license or otherwise, permits the Commission to include investments in the critical Deere Machines that practice those methods to establish a domestic industry." See CIB at 34. In contrast to the present investigation, however, the implied licensees in *Multi-Stage Fuel Vapor Canister Sys.* made a component of the domestic industry products. See *Certain Multi-Stage Fuel Vapor Canister Sys. & Activated Carbon Components Thereof*, Inv. No. 337-TA-1140, Initial Det. at 8-9 (Jan. 28, 2020). Moreover, the Commission took no position on that initial determination regarding the domestic industry requirement. See Comm'n Notice at 3 (Apr. 7, 2020).

²⁴ Because the undersigned has already determined that Deere's investments do not qualify toward a domestic industry, only investments made by Tama will be considered.

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CIB at 49. The Parties' dispute centers on whether these categories of expenses should be credited toward Tama's alleged domestic industry. *See id.* at 43-44; RIB at 44-49.

1. Labor and Travel-Related Expenses

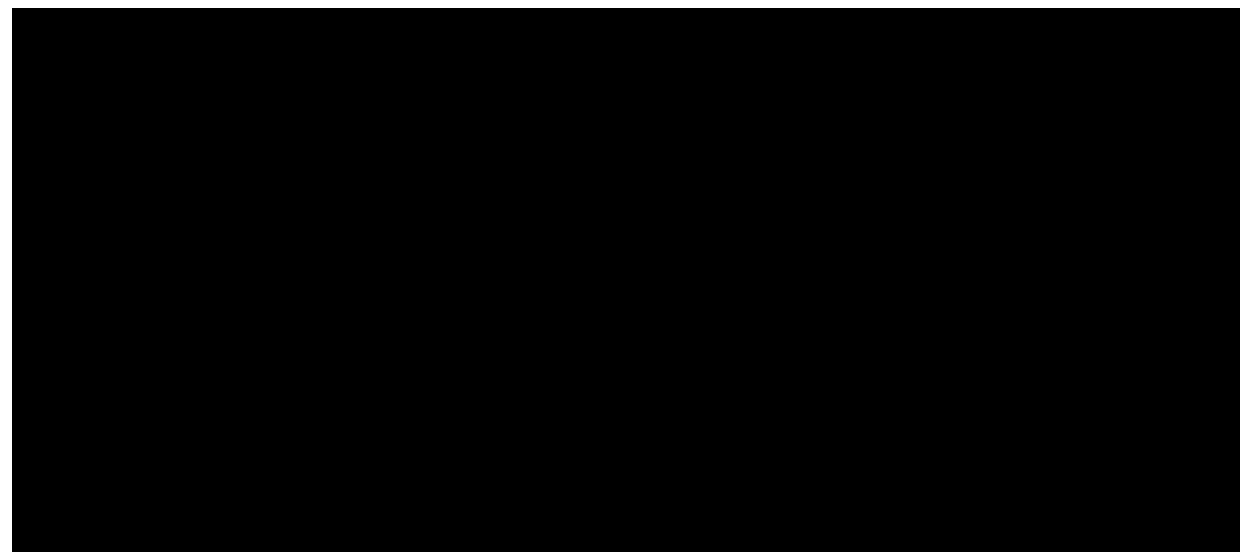
Tama submits that from 2014 to 2020, it expended [REDACTED] in labor in the U.S. specifically related to TamaWrap. CIB at 42, 45. Tama asserts that these expenditures "support education, technical support, and customer service for TamaWrap." *Id.* Tama also credits travel-related expenses for its personnel that train farmers and provide technical support. *Id.* at 47-48. Tama asserts that without these investments, its consultants would not be able to effectively support farmers and that "these regular visits with Deere, dealers, ginners, and farmers enable the proper use of the integrated solution of the Deere Machines and TamaWraps in the fields." *Id.*

Respondents claim that Tama improperly includes activities, such as sales and marketing, that are typical of an importer or seller. *Id.* at 44; RRB at 21-22. Respondents contend that Tama should have excluded those activities so that only value-added activities, such as testing and technical support, are considered. RIB at 44. For example, Respondents assert that [REDACTED] of Tama USA's employees and [REDACTED] consultants are engaged in account representatives, logistics, accounts payable, controller, inventory, and warehousing. *Id.* In addition, Respondents point out that Tama also includes other expenses related to consultant travel, including hotels, meals, and other travel-related expenses. *Id.* at 45. Respondents argue that these expenses constitute "sales, marketing, and other activities typical of any importer or seller" and thus, "must be excluded from Tama's domestic industry investment." *Id.* Respondents contend that even if these activities were credited, Tama's investments are insignificant. *Id.*; *see also* RRB at 22.

At issue is whether certain employees should be credited toward a domestic industry. The responsibilities of the employees that support TamaWrap include "account representatives,

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logistics, accounts payable, controller, finance, invoicing, rebate processing, legal, insurance, [] inventory[,], warehousing,” and office and customer support. *See* CX-0004C at Q/A 85. In addition, [REDACTED] consultants provide customer service, training, and technical support. *See id.* at Q/A 86. For example, Tama credits people with the following role descriptions:



See JX-0018C at 2. Most of these roles, however, are directed to activities that should not be credited toward a domestic industry. *See* JX-0029C at 42:10-48:6; *Certain Bone Cements, Components Thereof, and Products Containing Same* (“Bone Cements”), Inv. No. 337-TA-1153, Comm’n Op. at 22-23 (Jan. 25, 2021). For example, expenditures for employees who perform warehousing, inventory, and logistics should not be considered. *See Sleep-Disordered Breathing Treatment Sys.*, Initial Det. at 173 (finding that complainant’s “packaging and distribution operations . . . are analogous to activities that the Commission and the Federal Circuit have excluded from the domestic industry requirement”). Here, there is no evidence that those employees take additional steps to make TamaWrap saleable. *See Certain In Vitro Fertilization Prods., Components Thereof, and Prods. Containing the Same* (“In Vitro Fertilization Prods.”), Inv. No. 337-TA-1196, Comm’n Op. at 20-21 (Oct. 28, 2021) (“In most cases, the Commission has declined to credit general quality assurance and logistics activities because these are

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expenditures ‘that would be expected of any commercial purchaser.’”). Similarly, finance, invoicing, and account management are also activities that any importer would have to perform, and thus, should not be credited toward a domestic industry.

As to employees engaged in sales and marketing, the undersigned finds that Tama cannot rely substantially on sales and marketing expenses in the absence of more traditional section 337(a)(3) expenses. *See Certain Collapsible Sockets for Mobile Elec. Devices & Components Thereof*, Inv. No. 337-TA-1056, Comm’n Op. at 19-20 (July 9, 2018) (“*Collapsible Sockets*”) (explaining that the complainant “also provided evidence of significant expenditures in its employment of labor in other qualifying activities, such as engineering, product development, product assembly, supply chain and operation management, and customer service, as well as capital expenditures for fixtures, furniture, software, and equipment used for design, engineering, and operating management”); *In Vitro Fertilization Prods.*, Comm’n Op. at 22-23 (“While some Commission decisions allowed consideration of marketing and sales expenses, the Commission did so in conjunction with crediting more traditional section 337(a)(3) expenses. No Commission precedent allows Complainant to rely substantially on such promotion, marketing, and sales expenses to satisfy section 337(a)(3).”) Like *In Vitro Fertilization Prods.*, Tama’s asserted promotion, marketing, and sales expenses are not supplementing its domestic industry investments, but rather represent a substantial portion of those investments. *See id.* at 24; *see also Certain Vacuum Insulated Flasks and Components Thereof*, Inv. No. 337-TA-1216, Comm’n Notice at 3-4 (Oct. 21, 2021).

The only personnel that arguably perform activities that could qualify toward a domestic industry are the [REDACTED] consultants ([REDACTED]). *See* JX-0018C at 2; JX-0003C at ¶ 23. However, Tama has not provided evidence to support

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crediting most of the consultants' time toward a domestic industry; rather, the evidence shows that these consultants are primarily engaged in sales and marketing activities. *See* CX-0004C at Q/A 89 (Tama's expert allocating [REDACTED] of the consultants' labor toward a domestic industry). For example, Mr. Bieber states that his work "includes maintaining close relationships with Deere and the Deere dealer network, along with our common customers, namely gin operators and end users such as cotton farmers, organizing and participating in technical education presentations and events, and participating in research projects and other activities geared toward improving Tama's products, including TamaWrap™." JX-0003C at ¶ 6. He similarly describes the other three consultant's activities as "customer-facing activities" like "resolving technical issues" and "conducting training." *See id.* at ¶ 23. In addition, he explains that the consultants attend trade shows to "conduct product education, answer questions, and improve the product knowledge and operating technique" of customers. *See id.* Mr. Bieber's own role description describes him as a "Marketing Director." *See* JX-0018C at 2; *see also* JX-0003C at ¶ 3.

As previously explained, the undersigned finds that absent evidence of any investment in domestic activities such as engineering, product development, or manufacturing, Tama cannot rely substantially on sales and marketing expenses.²⁵ Tama does not introduce such evidence. While the [REDACTED] consultants conduct technical support and product testing, Tama does not present any evidence of how much of the consultants' time is spent on such activities. *See* JX-0003C at ¶¶ 9, 12, 23, 28; JX-0018C; CX-0004C at Q/As 87-90. The record therefore does not allow for a breakout of investments for those activities.²⁶

²⁵ It is undisputed that Tama does not manufacture TamaWrap in the United States. *See* CIB at 53.

²⁶ For the same reasons, the undersigned also declines to credit travel-related expenses for these consultants. *See* CX-0004C at Q/As 101-03.

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Accordingly, the undersigned finds that Tama's allocation of labor and travel-related expenses should not be credited toward a domestic industry.

2. Ambraco Acquisition

Tama contends that its acquisition of Ambraco, Inc. ("Ambraco")²⁷ in 2013 is relevant "because of the extensive technical knowledge of that workforce on the use of TamaWrap and depth of experience to provide technical support to Deere dealers and American farmers." CIB at 44-45. Tama argues that the "acquired expertise dates back to the beginning of the development process and some of the earliest product field tests conducted across the United States" and that "it enabled Tama to have domestic resources and personnel on hand year-round through the many seasons and accompanying market fluctuations to professionally serve the cotton belt and to properly teach, support, and service American famers [*sic*] using TamaWrap and the patented methods on Deere Machines." *Id.* at 45. Tama's expert allocated [REDACTED] of the total [REDACTED] purchase price towards Tama's domestic industry, which Tama asserts "represents customer relationships and goodwill, reduced in accordance with the relative revenue of Tama USA for sales of TamaWrap in the United States only in 2014 immediately after the acquisition." *Id.*

Respondents argue that the Ambraco acquisition should not be included in Tama's alleged domestic industry investment. RIB at 49. Respondents argue that "customer relationships and goodwill" expenditures relate to sales and marketing, and thus cannot count toward labor and capital. *Id.* Additionally, Respondents contend that even if these expenditures could count toward a domestic industry, they are not relevant "because they would only show Tama's domestic industry activities in 2013, not 2020 when Tama filed its ITC complaint." *Id.*

²⁷ Tama acquired Ambraco, Tama's representative in the U.S, which eventually became Tama USA. *See* CX-0002C at Q/A 3.

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As discussed above, the undersigned has declined to credit Tama's labor investments in Tama USA employees. For the same reasons, the undersigned finds that it would not be appropriate to credit Tama's acquisition of Ambraco, which eventually became Tama USA.

3. Components

Tama contends that it invests significant capital in the U.S. to source raw materials and components used to make TamaWrap. CIB at 46. Tama claims that two critical components – RFID tags from Honeywell and linear low-density polyethylene (LLDPE) from Exxon – are domestically manufactured and represent [REDACTED] of the total cost to produce TamaWrap. *Id.* Tama asserts that these components originate in the U.S. *Id.* at 47.

Respondents argue that Tama improperly includes the RFID tags and LLDPE components. RIB at 46. Respondents claim that these components were purchased outside of the U.S. and shipped to Israel. *Id.* Specifically, Respondents submit that these components were purchased from a Honeywell entity in the Netherlands and from an Exxon entity in Belgium, by two Israeli entities that are not complainants in this Investigation. *Id.*

Regardless of where these components originate, Tama does not present any evidence that the components are anything other than off-the-shelf components purchased from suppliers that are neither contractors nor subcontractors. *See* CIB at 46-47. This is not the type of investment that the Commission credits under subsection (B). *Compare Lelo Inc. v. Int'l Trade Comm'n*, 786 F.3d 879, 884 (Fed. Cir. 2015) (not crediting purchase of off-the-shelf components made by suppliers that are not contractors or subcontractors), *with Certain Solid State Storage Drives, Stacked Elecs. Components, and Prods. Containing Same*, Inv. No. 337-TA-1097, Comm'n Op. at 24-26 (June 29, 2019) (crediting labor related to contractors' "specialized services"). Tama also does not present "evidence of any investment made in capital or labor as a result of the purchased

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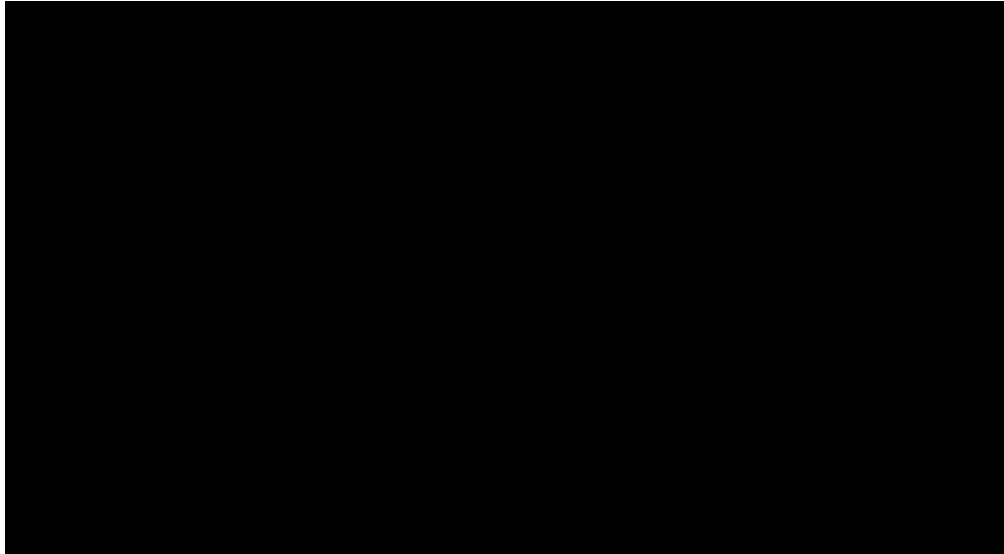
components.” *See Lelo*, 786 F.3d at 884-85 (“The purchase of so called ‘crucial’ components from third-party U.S. suppliers are insufficient to satisfy the ‘significant investment’ or ‘significant employment of labor or capital’ criteria of § 337 where there is an absence of evidence that connects the cost of the components to an increase of investment or employment in the United States.”). Thus, the undersigned finds that Tama’s investments in the RFID and LLDPE components do not qualify toward a domestic industry.

4. [REDACTED] Administrative Fee

Tama credits an administrative fee that it pays [REDACTED]. CIB at 42, 47. Tama alleges that this “[REDACTED]
[REDACTED]
[REDACTED]” and that “[REDACTED]
[REDACTED]
[REDACTED]” *Id.* at 47.

Respondents claim that Tama’s administrative fee payment [REDACTED] should not be included in its alleged domestic industry investment. RIB at 48. Respondents assert that “Tama pays this administrative fee [REDACTED] on sales Tama [REDACTED]” and thus, “this administrative fee is a cost of sales and should not be included.” *Id.* at 48-49.

Per [REDACTED], Tama pays [REDACTED]
[REDACTED].” *See* CX-0002C at Q/A 8. [REDACTED]
[REDACTED]:



JX-0013C at 8. As evidenced above, this [REDACTED].” *See id.* Mr. Inbar also testified that this fee was “[REDACTED]” [REDACTED] [REDACTED].” JX-0030C at 37:15-22. Thus, even if this fee was related to [REDACTED], it appears that this fee is related to [REDACTED]. In addition, Tama fails to present evidence of any investment made in capital or labor resulting from this fee. The undersigned therefore finds that the [REDACTED] administrative fee does not qualify toward a domestic industry.

5. Administrative Expenses

Tama claims that it incurs significant administrative expenses to support TamaWrap, including “annual leasing costs for the Dubuque office, utilities, office related expenses, property taxes paid on inventory stored in warehouses, travel expenses related to the administration [administrative] employees, association fees, and charitable contributions.” CIB at 48. Excluding certain freight expenses, Tama asserts that its administrative expenses average about [REDACTED] annually from 2014 to 2020. *Id.* According to Tama, these expenses are “qualitatively significant

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as they help facilitate the full range of services Tama offers to farmers, including technical support, service, and training.” *Id.*

The undersigned declines to credit these investments, which are even further removed from TamaWrap than those discussed above. These administrative expenses are the type of expenses one would expect any importer to incur. *See Bone Cements*, Comm’n Op. at 22-23.

6. Conclusion

As discussed above, the undersigned has declined to credit any of the categories of investments that Tama asserts. What remains is no monetary investment in labor and capital. Accordingly, the undersigned finds that Tama has failed to satisfy the economic prong of the domestic industry requirement under section 337(a)(3)(B).

D. Research, Development, and Patent Exploitation

1. Nexus

Tama asserts that there is no genuine dispute that its “ongoing tests are necessary to ensure the proper functioning of the Z-lock and the longevity of the benefits associated with the patented features of TamaWrap.” CIB at 51. In addition, Tama argues that it performs annual field tests to improve its product and test the functionality of the Z-lock feature of TamaWrap. *Id.*

Respondents argue that Tama fails to show any investment under subsection (C) because Tama’s alleged investments were directed to either TamaWrap or Deere machines, not the ’209 patent itself. RIB at 50. Respondents also claim that these investments do not bear the required nexus to the ’209 patent because “Tama has not shown that the purportedly ongoing R&D relate to a feature discussed, let alone claimed, in the ’209 patent.” *Id.* at 51; *see also* RRB at 23-24.

The undersigned finds that Tama has established that its research and development (“R&D”) expenses have the required nexus to the ’209 patent. “Subprong (C) requires ‘substantial’

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domestic investments in the exploitation of the patent, which must be supported by a demonstration of ‘nexus’ between the investments and the patent right.” *Certain Non-Volatile Memory Devices and Prods. Containing the Same*, Inv. No. 337-TA-1046, Comm’n Op. at 41 n.11 (Oct. 26, 2018) (citing 19 U.S.C. § 1337(a)(3)(C)); *Certain Integrated Circuit Chips*, Inv. No. 337-TA-859, Comm’n Op., 2014 WL 12796437, at *21 (Aug. 22, 2014)). “The nexus may be ‘readily inferred’ if the domestic industry article is ‘the physical embodiment of the asserted patent.’” *Certain Electronic Candle Prods. and Components Thereof*, Inv. No. 337-TA-1195, Comm’n Op. at 15-16 (Sept. 13, 2021). The nexus requirement can be presumed when the research investment is in the article protected by the patent. *Id.* Here, TamaWrap is the embodiment of the patented invention and thus, the evidence supports the inference that Tama’s R&D efforts in TamaWrap are inextricably linked to the ’209 patent.

2. Tama’s R&D Investments

Tama asserts that it has invested [REDACTED] in the development and exploitation of the patented technology.²⁸ CIB at 51. Tama contends that the development of TamaWrap depended heavily on field tests and that “[t]he initial development phase of TamaWrap alone cost Tama no less than [REDACTED].” *Id.* From 2010 to 2020, Tama contends that it conducted at least 38 field tests at an estimated cost of at least [REDACTED]. *Id.* at 52. Tama asserts that it also conducted weathering tests “to ensure that the Z-lock has properly protected the adhesive prior to exposure, and to ensure that the adhesive within the Z-lock is able to prevent tails from separating from wrapped bales throughout various weather conditions.” *Id.* Tama argues that this testing results in expenses that are both quantitatively and qualitatively significant. *Id.* at 53. Specifically, Tama contends that its [REDACTED] initial investment as it pioneered a new industry was [REDACTED] of

²⁸ Again, because the undersigned has already determined that Deere’s investments do not qualify toward a domestic industry, only investments made by Tama will be considered.

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the gross sales of TamaWrap in its first year of commercialization in 2009 and [REDACTED] of TamaWrap gross sales the year after.” *Id.*

Respondents argue that Tama fails to show any investment under subsection (C) because Tama’s alleged investments were directed to either TamaWrap or Deere machines, not the ’209 patent itself. RIB at 50. Respondents assert that Tama’s alleged investments are *de minimus* because the expenses for field tests constitute less than [REDACTED] of the net U.S. sales in 2019. *Id.* at 50-51; *see also* RRB at 23. Respondents also claim that these investments do not bear the required nexus to the ’209 patent because “Tama has not shown that the purportedly ongoing R&D relate to a feature discussed, let alone claimed, in the ’209 patent.” RIB at 51; RRB at 23-24.

The undersigned first finds that Tama has not established that it invested [REDACTED] in the initial development of TamaWrap. Tama does not introduce any substantive evidence supporting that estimate. *See* CX-0004C at Q/A 130; CX-0001C at Q/As 32-33 (Mr. Inbar testifying that “[w]e do not have precise financial information available from the early 2000s”). Without some amount of corroboration, the undersigned cannot rely on Tama’s alleged [REDACTED] investment. Moreover, Mr. Inbar’s testimony suggests that this investment included testing. *See* CX-0001 at Q/A 33. Thus, it is unclear whether, and to what extent, this overlaps with Tama’s estimated [REDACTED] investment in field testing.

As for Tama’s field tests, it estimates that each field test costs [REDACTED], which includes material expenses as well as travel expenses. *See* CX-0004 at Q/A 133. Tama estimates that during 2010 through 2020, it conducted [REDACTED] field tests, which amounted to [REDACTED]. *See id.* at Q/As 134-36. This estimate excludes travel-related expenses for 2017-2019 because Tama previously included them in its labor and capital investment. *See id.* at Q/A 136. As previously discussed, the undersigned declined to credit those travel-related expenses to subsection

(B). The undersigned, however, finds that these travel expenses were necessary to conducting the field tests and thus, credits them here. Therefore, it appears that Tama's total investment in the field tests for 2010 through 2020 is [REDACTED]. In addition, Tama estimates that it invests [REDACTED] in each weathering test, and that it conducted [REDACTED] such tests during 2017 through 2020. *See* CX-0004C at Q/A 139-40. Thus, Tama invested about [REDACTED] in weathering tests from 2017 through 2020 ([REDACTED]). *See id.*

Comparing Tama's investments in field tests and weathering tests to its U.S. sales revenue demonstrates that such investments are not quantitatively substantial.²⁹ Tama asserts its U.S. sales in TamaWrap are as follows:

	TamaWrap Gross Sales (in millions USD)	TamaWrap Net Sales (in millions USD)
2009 (Ambraco)	[REDACTED]	
2010 (Ambraco)		
2011 (Ambraco)		
2012 (Ambraco)		
2013 (Ambraco)		
2014		
2015		
2016		
2017		
2018		
2019		
2020		
Total (2009-20)		
Total (2014-20)		

CX-0004C at Q/A 58. Thus, for 2014 through 2020, Tama's investment per year in testing (both field tests and weathering tests) only amounts to [REDACTED] of its U.S. net sales. *See* CX-0004C at Q/As 58, 133-36, 139-40; *see also* RIB at 50-51. The undersigned finds that this is not

²⁹ In assessing the relative importance of Tama's R&D investments, the Commission may consider a comparison between those investments and sales of protected articles. *See Certain Carburetors and Prods. Containing Such Carburetors* ("Carburetors"), Inv. No. 337-TA-1123, Comm'n Op. at 8-9, 17, 20 (Oct. 28, 2019).

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substantial.^{30, 31} Accordingly, the undersigned finds that Tama has failed to satisfy the economic prong of the domestic industry requirement under section 337(a)(3)(C).

E. Conclusion

For the reasons set forth above, the undersigned finds that Tama has not satisfied the economic prong of the domestic industry requirement.

VI. CONCLUSIONS OF LAW

1. The importation or sale requirement of section 337 has been satisfied.
2. The 169 wrap does not infringe any of the asserted claims of U.S. Patent No. 6,787,209.
3. The Accused Products infringe claim 1 of U.S. Patent No. 6,787,209.
4. The 168 wrap (old) infringes claims 2, 4-7, and 10-14 of U.S. Patent No. 6,787,209.
5. The 168 wrap (new) and 170 wrap infringe claims 2 and 4-14 of U.S. Patent No. 6,787,209.
6. Respondents do not infringe claims 32, 33, 35-38, or 41-44 of U.S. Patent No. 6,787,209.
7. The technical prong of the domestic industry requirement for U.S. Patent No. 6,787,209 has been satisfied.
8. U.S. Patent No. 6,787,209 is valid.
9. The economic prong of the domestic industry requirement has not been satisfied for U.S. Patent No. 6,787,209.

³⁰ Although the undersigned has already determined not to rely on Tama's alleged initial [REDACTED] investment, the undersigned notes that Tama compares this investment to the gross sales of TamaWrap in 2009 and 2010 to argue it is "undoubtedly substantial." See CIB at 53. That investment, however, appears to be spread out over the course of 2002-2009. See CX-0001C at Q/A 33. Thus, it is misleading to compare the total alleged investment from 2002-2009 to the sales of any particular year in assessing substantiality.

³¹ Because the undersigned has found that Tama's R&D investments are not quantitatively substantial, the qualitative factors need not be addressed. See *Carburetors*, Order No. 77 at 7 (Aug. 12, 2019); *Lelo*, 786 F.3d at 885.

VII. RECOMMENDED DETERMINATION ON REMEDY AND BONDING

The Commission's Rules provide that subsequent to an initial determination on violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, the administrative law judge shall issue a recommended determination concerning the appropriate remedy in the event that the Commission finds a violation of section 337, and the amount of bond to be posted by respondents during Presidential review of the Commission action under section 337(j). *See* 19 C.F.R. § 210.42(a)(1)(ii). The Commission has broad discretion in selecting the form, scope, and extent of the remedy in a section 337 proceeding. *Viscofan, S.A. v. Int'l Trade Comm'n*, 787 F.2d 544, 548 (Fed. Cir. 1986).

A. Limited Exclusion Order

Under section 337(d), if the Commission determines that there is a violation of section 337, the Commission may issue a limited exclusion order ("LEO") directed to a respondent's infringing products. 19 U.S.C. § 1337(d). A limited exclusion order instructs the U.S. Customs and Border Protection to exclude from entry all articles that are covered by the patent at issue that originate from a named respondent in the investigation. *Fuji Photo Film Co. Ltd. v. Int'l Trade Comm'n*, 474 F.3d 1281, 1286 (Fed. Cir. 2007).

Tama requests that the Commission issue a LEO directed to Respondents, and "their affiliated companies, parents, subsidiaries, or other related business entities or their successors or assigns."³² CIB at 58. Tama submits that the LEO should include products "'manufactured or imported by or on behalf of Respondents,' here the YJ168168 (old), YJ168168, and YJ16870 that infringe the '209 Patent.'" *Id.*

³² Tama also seeks a LEO against the products of Respondent XFY, who has been found to be in default. CIB at 58; *see also* EDIS Doc ID 726693.

PUBLIC VERSION

Respondents do not address the appropriateness of a LEO and have therefore waived any arguments against the issuance of a LEO. *See generally* RIB at 51-52; RRB at 24; *see also* G.R. 13.1.

The undersigned agrees with Tama that a LEO is an appropriate remedy. The undersigned therefore recommends the issuance of a limited exclusion order covering the Respondents' products found to infringe the Asserted Patent, should the Commission determine a violation of section 337 has occurred.

B. Cease and Desist Order

Under section 337(f)(1), the Commission may issue a cease-and-desist order ("CDO") in addition to, or instead of, an exclusion order. 19 U.S.C. § 1337(f)(1). The Commission generally issues a CDO directed to a domestic respondent when there is a "commercially significant" amount of infringing, imported product in the United States that could be sold, thereby undercutting the remedy provided by an exclusion order. *See Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293 USITC Pub. 2391, Comm'n Op. on Remedy, the Public Interest and Bonding at 37-42 (June 1991); *Certain Condensers, Parts Thereof & Prods. Containing Same, Including Air Conditioners for Automobiles*, Inv. No. 337-TA-334 (Remand), Comm'n Op. at 26-28, 1997 WL 817767 at *11-12 (U.S.I.T.C. Sept. 10, 1997).

Tama believes a CDO is appropriate "[b]ecause SMA has accused product stored in inventory in the United States." CIB at 59. Tama contends that a CDO is also appropriate because "it will limit the Respondents' ability to sell products that could be imported after an initial exclusion is entered to stockpile cotton rolls in advance of the harvesting season and flood the market before a Final Determination." *Id.*

PUBLIC VERSION

Respondents oppose entry of a CDO. RIB at 51; RRB at 24. According to Respondents, Yajia maintains no inventory in the United States of the Accused Products and SMA does not have “commercially significant” inventory. *Id.*

The undersigned recommends against a CDO for Yajia. First, Tama did not address whether Yajia maintains any inventory in the United States, let alone a commercially significant amount. *See, e.g.*, CIB at 59; CRB at 25. Tama has therefore waived any argument that a CDO is warranted as to Yajia. G.R. 13.1. Second, the evidence shows that Yajia does not maintain a commercially significant inventory. CX-0138C at 34. Tama has also not shown that Yajia engages in any domestic operations that could undercut the remedy provided by the limited exclusion order.

The undersigned also recommends against a CDO for SMA. While Tama asserts that a CDO is warranted because SMA has “some Accused product stored in inventory,” Tama did not present any evidence or testimony showing that SMA’s U.S. inventory is commercially significant. *See* CIB at 59. In fact, the evidence shows that SMA does not maintain commercially significant inventory in the U.S. *See* CX-0105C at 96:20-97:5; 97:15-99:2; CX-0106C at 32:10-14; The undersigned therefore finds that Tama has failed to show it is entitled to a CDO against SMA. CX-0138C.

C. Bonding

Pursuant to section 337(j)(3), the Administrative Law Judge and the Commission must determine the amount of bond to be required of a respondent during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue a remedy. 19 U.S.C. § 1337(j)(3). The purpose of the bond is to protect the complainant from any injury. 19 C.F.R. § 210.42(a)(1)(ii), § 210.50(a)(3).

PUBLIC VERSION

When reliable price information is available, the Commission has often set the bond by eliminating the differential between the domestic product and the imported, infringing product. *See Microsphere Adhesives, Processes for Making Same, & Prods. Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. 2949, Comm'n Op. at 24 (Dec. 8, 1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *See, e.g., Certain Integrated Circuit Telecomm. Chips & Prods. Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm'n Op. at 41, 1993 WL 13033517, at *24 (U.S.I.T.C. June 22, 1993). A 100 percent bond has been required when no effective alternative existed. *See, e.g., Certain Flash Memory Circuits & Prods. Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997) (imposing a 100% bond when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be *de minimis* and without adequate support in the record).

Tama requests that the Commission impose a bond of [REDACTED] with regard to TamaWrap's Premium product and [REDACTED] with regard to TamaWrap's Blue Value product. CIB at 59-60. Tama explains that there is a price differential of [REDACTED] between the cotton wrapping product distributed by SMA and supplied by Yajia and TamaWrap's Premium product. *Id.* Tama further explains that the price differential between SMA's cotton wrapping material product and TamaWrap's Blue Value product is [REDACTED]. *Id.* If, however, the Commission finds that a bond rate based on price differential is not appropriate, Tama asks that a 100% bond be imposed during the Presidential review period. *Id.* at 60.

Respondents submit that bond should be [REDACTED], which is the price differential between the Accused Products and Tama's comparable products. RIB at 51-52; RRB at 24.

PUBLIC VERSION

The undersigned agrees with the Parties that bond should be calculated based on the price differential between the Accused Products and the TamaWrap products. The undersigned also agrees that the price differential between the SMA product and TamaWrap's Blue Value product is [REDACTED]. CX-0004C at Q/A 174; CDX-0003C.59. Respondents, however, do not address the price differential between the SMA product and TamaWrap's Premium product. *See generally* RIB at 51-52. Thus, based on the evidence presented, the undersigned recommends that the Commission set the bond rate at [REDACTED] for TamaWrap's Premium product and [REDACTED] for TamaWrap's Blue Value product, if a violation of section 337 is found.

VIII. INITIAL DETERMINATION

Based on the foregoing, it is the Initial Determination of the undersigned that no violation of section 337 of the Tariff Act of 1930, as amended, has occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain wrapping material and methods for use in agricultural applications with respect to U.S. Patent No. 6,787,209.

The undersigned hereby certifies to the Commission this Initial Determination and the Recommended Determination. The Parties' briefs³³, which include the final exhibits lists, are not certified as they are already in the Commission's possession in accordance with Commission rules. 19 C.F.R. § 210.38(a).

The Secretary shall serve the confidential version of this Initial Determination upon counsel who are signatories to the Protective Order issued in this Investigation. A public version will be served at a later date.


³³ Any arguments from the Parties' pre-hearing briefs incorporated by reference into the parties' post-hearing briefs are stricken, unless otherwise discussed herein, as an improper attempt to circumvent the page limits imposed for post-hearing briefing.

PUBLIC VERSION

Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review pursuant to 19 C.F.R. § 210.43(a) or the Commission, pursuant to 19 C.F.R. § 210.44, orders on its own motion a review of the Initial Determination or certain issues therein.

Within ten days of the date of this document, the Parties must submit a statement to Bullock337@usitc.gov stating whether they seek to have any portion of this document redacted from the public version. The Parties shall attach to the statement a copy of a joint proposed public version of this document indicating with red brackets any portion asserted to contain confidential business.³⁴ To the extent possible, the proposed redacting should be made electronically, in a PDF of the issued order, using the “Redact Tool” within Adobe Acrobat, wherein the proposed redactions are submitted as “marked” but not yet “applied.” The Parties’ submission concerning the public version of this document should not be filed with the Commission Secretary.

SO ORDERED.


Charles E. Bullock
Chief Administrative Law Judge

³⁴ If the Parties submit excessive redactions, they may be required to provide an additional written statement, supported by declarations from individuals with personal knowledge, justifying each proposed redaction and specifically explaining why the information sought to be redacted meets the definition for confidential business information set forth in Commission Rule 201.6(a). *See* 19 C.F.R. § 201.6(a).